Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES J. JENTGEN, TRUSTEE,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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QUESTIONS PRESENTED

I. Whether total destruction of all viable economic use is a prerequisite to the award of compensation in an inverse condemnation "taking" case involving the exercise of federal commerce clause powers, as opposed to state police powers, in denying required permits to perform work in waters of the United States under Section 10 of the Rivers and Harbors Appropriation Act of 1899 and Section 404 of the Federal Water Pollution Control Act Amendments of 1972.

II. Whether the Court of Claims must articulate the basis for summary findings which are directly contrary to findings made by the trial judge in an inverse condemnation "taking" case.

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No.

JAMES J. JENTGEN, TRUSTEE,
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v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, James J. Jentgen,* prays that a writ of certiorari issue to review the decision of the United States Court of Claims.

OPINIONS BELOW

The opinion of the United States Court of Claims, reported at 657 F2d 1210, is reproduced in the Appendix. The opinion of the Trial Judge is not reported.

JURSIDICTION

The opinion of the Court of Claims was entered August 19, 1981. App. 1, *et seq.*. The jurisdiction of this Court is invoked uner 28 USC §1255 (1).

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*Pursuant to Rule 21.1(b) petitioner states that Mr. J. Fred Gardner and Mr. William Illingworth are parties interested in the outcome of this proceeding.

STATUTES INVOLVED

Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, and Section 404 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1344, are involved in this case; however, the resolution of the questions presented herein do not turn on their construction.

STATEMENT

Petitioner James J. Jentgen in 1971 purchased for $150,000 a 101.8 acre tract of land located within the city limits of Everglades City, Florida.[1] He planned to develop there a water-oriented residential community adapted to the needs of man and nature.[2]

After two years of land surveys, development plans, modifications, and negotiations with state authorities, Jentgen secured the necessary state permits on a finding that the proposed development project would be in the public interest.[3] Petitioner undertook promptly thereafter to secure a required permit from the U.S. Army Corps of Engineers pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §403. He also undertook to secure a required permit from the Corps pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1344.[4]

After nearly three years of negotiations back and forth with federal officials, the Corps on September 22, 1976, offered Jentgen a "modified" permit limiting work to only certain

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[1]Mr. Jentgen holds title to the property as Trustee for himself (70%), Mr. J. Fred Gardner (15%) and Mr. William Illingworth (15%) under a Land Trust Agreement dated November 19, 1971.

[2]The property at issue consists of approximately 78 acres of mangroves and 23.8 acres of upland. The property is literally surrounded by Everglades National Park, a federally owned park encompassing approximately 1,400,533 acres, plus an additional 570,000 acres contained in the Big Cypress National Preserve (P.L. 93-440, October 11, 1974, 88 Stat. 1258).

[3]Permit and Certificate from the State of Florida, Board of Trustees of the Internal Improvement Trust Fund, issued December 18, 1973, and State of Florida Department of Pollution Control, issued September 17, 1973.

[4]The Section 10 permit was required to remove a plug to connect a marina with the Barron River and to construct a wooden dock. The Section 404 permit was required to dredge and fill in connection with the excavation of a marina and lakes and the placement of fill on the property.

specified areas.[5] Mr. Jentgen, a developer of long experience, concluded, however, that the "plan" proposed by the Corps was neither marketable nor economically feasible. Thereafter, on July 5, 1977, the Corps informed petitioner that his permit applications had been denied.

Left with no alternative, petitioner filed suit in the Court of Claims on August 9, 1977, pursuant to 28 U.S.C. §1491, alleging that his property had been taken for public use without the payment of just compensation.

On November 25, 1980, after a full trial, the Trial Judge concluded that Mr. Jentgen was entitled to recover for the inverse condemnation of his property. The Trial Judge's conclusion was based upon the ultimate finding that:

> "Unless developed for residential purposes, plaintiff's property has no other economic value whatsoever; its ecological value, if any, being worthless to private owners and of little or no value to commercial or sports fishermen in the area . . ."[6]

Defendant appealed and on August 19, 1981, the Court of Claims issued a seven-page Opinion reversing the Trial Judge and concluding that petitioner was not entitled to recover.[7] This conlusion was based primarily upon the court's unilateral and summary finding, unsupported by any articulated rationale, that petitioner was left with some economically viable use for his property because (1) "the Corps did offer plaintiff the necessary permits to develop over 20 acres . . ." and (2) that "the market value of the

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[5]The "modified" permit offered by the Corps proposed development on only 20 acres. The Trial Judge found that "any development plan adaptable to (that area) was neither economically feasible nor practically marketable." Ultimate Findings, App. 8.

[6]The opinion of the Trial Judge encompasses 122 pages and is unpublished. The ultimate findings are set out in the Appendix at App. 8.

[7]The Court of Claims Opinion is reprinted in its entirety in the Appendix.

property, post-denial, is still between $80,000 and $150,000; the latter figure being the amount plaintiff paid for the property in 1971." Neither finding is based upon any cited evidence and both findings are directly contrary to the findings made by the trier of fact.

I. THE COURT OF CLAIMS HAS DECIDED AN IMPORTANT QUESTION UNDER THE DUE PROCESS CLAUSE, THE RIVERS AND HARBORS APPROPRIATION ACT OF 1899 AND THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

The Court of Claims decision in this case is based solely upon its determination that while Mr. Jentgen had suffered a diminution in value of his property, it nonetheless has not been rendered valueless as a consequence of government regulation.[8]

Citing this Court's decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), the Court states:

> "While '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations,' . . . the decisions of the Supreme Court 'uniformly reject the proposition that *diminution in property value, standing alone, can establish a taking.*' "
> *Id.* at 131, *citing Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); *Hadachek v. Sebastian*, 239 U.S. 394 (1915) (87.5% diminution in value).

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[8]See Part II *Infra.*, where petitioner states that the Court's conclusion respecting the post-regulation value of the property is wholly unsupported.

In applying this test, *i.e.*, diminution *versus* complete destruction of value, the Court of Claims relies on cases involving the application of *state police powers* rather than the exercise of federal powers pursuant to the commerce clause.[9] These police power cases arise primarily in the context of zoning ordinances which are claimed to effect a taking. *E.g., Agins v. City of Tiburon,* 447 U.S. 255 (1980); *Euclid v. Ambler Realty Co.,* 272 U.S. (1926).

Petitioner believes that the "taking" standard developed in "police power" type cases is inappropriate for application in cases such as the one at bar involving an exercise of federal commerce clause powers which operate to impose a federal "conservation easement" on private property.[10] In such cases, petitioner believes that *United States v. Causby,* 328 U.S. 256 (1946), and related cases, should control.

In *Causby,*this Court held that direct overflights, above claimant's land, that destroyed the present use of the land as a chicken farm, constituted a taking. *Id.* at 262-263. *Causby* emphasized that Government had not "merely destroyed property (but was) using a part of it for the flight of planes." *Id.*[11] In the case at bar, just as in *Causby,* the government, through an exercise of its commerce clause powers, has destroyed a present use -- purchase for development purposes -- and is using the property for its own purposes — to protect the delicate ecological balance in the Everglades in order to preserve the area for the national interest and to

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[9]The federal government has no "police powers" but rather exercises similar powers pursuant to the commerce clause. See, e.g., *Brooks v. United States,* 267 U.S. 432 (1925).

[10]The application of a "police power" standard is particularly inappropriate where, as here, the State of Florida, in a proper exercise of its state police powers, granted Mr. Jentgen the necessary permits.

[11]See also *Griggs v. Allegheny County,* 369 U.S. 84 (1962) (overflights held a taking); *Portsmouth Co. v. United States,* 260 U.S. 327 (1922) (U.S. military installation's firing of guns over claimant's land a taking); *United States v. Cress,* 243 U.S. 316 (1917) (repeated floodings of land caused by water project is a taking).

foster commercial and sport fishing interests in the area.[12] Plainly, the value of the land in *Causby* was not totally destroyed. Rather, the land suffered a diminution in value because of the exercise of government powers under the commerce clause -- "here enjoyment and use of the land are not completely destroyed . . . the use of the airspace immediately above the land (merely) limit(s) the utility of the land and cause(s) a diminution in its value" *Id.* at 262.[13]

In *Causby* the Court held that an easement had been taken by the government's exercise of its powers under the commerce clause and that while the value of the property involved had not been totally destroyed, the diminution was sufficient to give rise to a taking. Thus, the taking analysis under commerce clause cases such as *Causby* is, and should be, different from the analysis under police power cases such as *Penn Central* and *Euclid, supra*. For this reason the results in the instant case in the Court of Claims are in direct conflict with this Court's decision in *Causby*, and petitioner believes that the Court should grant certiorari to resolve this conflict.

Moreover, petitioner respectfully submits that the police power-commerce clause distinction is of critical importance and that it should be more clearly drawn by this Court. Petitioner's taking claim was rejected summarily because the court concluded that the value of his property was not totally extinguished by virtue of the Corps and EPA regulations. The failure of the court to determine the extent of diminution operated in this case to deprive petitioner of due process of

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[12]"The Jentgen permit denial was based on national public interest concerns . . . (t)he overriding national factors which directed denial . . . are solely of ecological concern as enunciated in the 404(b) guidelines of EPA and in Corps of Engineers Wetland Policy . . . (t)he objective of the EPA and Corps guidelines could be met by acquisition of the Jentgen property, in fee." Trial Judge Opinion, at P. 111-112.

[13]See also *United States v. General Motor Corp.*, 323 U.S. 373 ("Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete to deprive the owner of all *or most* of his interest in the subject matter, to amount to a taking." *Id.* at 378 (emphasis added)

law and to inflict on petitioner a substantial economic loss.[14]

The commerce clause was designed to protect and foster interstate commerce. *Gibbons v. Ogden*, 9 Wheat 1 (1824). Although the commerce powers have been expanded greatly over the years they cannot and should not be expanded by the Court of Claims to effect a taking in *all* circumstances absent the total destruction of *all* viable economic use. The commerce clause, in the context of a taking, must be read more narrowly *vis-a-vis* the extent of diminution than state police powers which encompass "an immense mass of legislative power to be used for the protection of state welfare and the promotion of local (health and safety) interests." *Gibbons, supra.*

This Court has never held, even in "police power" type cases, as has the Court of Claims in this "commerce clause" case that no taking can occur unless *all* viable economic use is *totally* extinguished by the challenged regulations.

Indeed, in the landmark case in this area, this Court contemplated an analysis of the *extent* of diminution rather than a determination of total economic destruction --

> "One fact for consideration . . . is the extent of diminution. When it reaches a certain magnitude. . . there must be an exercise of eminent domain . . . *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

Ownership contemplates highest and best economic use - not minimal or non-economic use. While property must bear many public burdens, e.g., taxes, zoning, etc., no court has ever suggested that private property must bear alone regulatory action in the public interest which deprives the owner of *all* substantial economic value. If this were the case, the "taking" clause of the Fifth Amendment would become virtually meaningless.

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[14]In addition to the $150,000 purchase price, Mr. Jentgen has expended approximately $300,000 in development plans, legal fees, taxes, etc., and has lost the use of this money for nearly 10 years. Using the $6,000,000 figure Mr. Jentgen claims, and which represents the highest and best use, Mr. Jentgen has suffered a 98% diminution in value even using the $150,000 figure noted by the court below.

The question presented is especially important because of the broad reach of Corps and EPA jurisdiction under Section 404 of the FWPCA.[15] Under the precedent of *Jentgen*, if allowed to stand, the federal government, operating through the Corps of Engineers, will be able to "take" by regulation vast amounts of privately owned wetlands without ever having to pay for it.[16] The government will be able to accomplish this under the analysis applied by the Court of Claims in *Jentgen* regardless of the extent of diminution because any property always has some incident of economic value to someone.

As stated by this Court in *Armstrong v. United States*, 364 U.S. 40 (1960) --

> "The Fifth Amendment guarantee that private property shall not be taken for public use without just compensation was designed to bar government from forcing some people alone to bear public burdens which, in all justice and fairness should be borne by the public as a whole." *Id.* at 49.

Petitioner believes that the importance of this question and the effect which its resolution will have on vast amounts of wetland areas now in private ownership warrant the issuance of a writ of certiorari.

II. THE COURT OF CLAIMS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS RESPECTING THE REVERSAL OF THE TRIAL JUDGE'S FINDINGS OF FACT AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

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[15]The jurisdiction of the Corps under §404 of the FWPCA was intended by Congress to have the broadest possible reach. *United States v. Holland, 373 F.Supp. 665 (M.D.Fla 1974).*

[16]The federal government already owns nearly 761 million acres of land, of which approximately 58 million acres have been acquired by eminent domain within the confines of the Fifth Amendment and not acquired by a "regulatory" seizure of private property.

The Court below based its decision in this case solely on the fact that, in its opinion, Mr. Jentgen was left with some viable economic use of his property, and, therefore, no taking had occured.[17] The court, however, cites no record support for its conclusion that petitioner had remaining after the permit denials a viable economic use of his property.

In fact, this conclusion is directly contrary to the carefully detailed analysis and findings of the trier of fact that "(u)nless developed for residential purposes, plaintiff's property has no other economic value whatsoever," and that "(a)ny development plan adaptable to (the 20 acres of land for which the Corps offered the permit) is neither economically feasible nor practically marketable."[18]

Petitioner believes that the court's summary conclusion, unsupported by any articulated reasons or evidentiary support therefor, respecting the ultimate conclusion in the case is a denial of due process and constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Although the court below states in a footnote that "all the findings necessary to the rendering of this decision are contained herein," that simply is not the case.

As stated by Justice Douglas in *Causby, supra,* in remanding the case to the Court of Claims for failure to find material facts -- "(f)indings of fact on every 'material issue' are a statutory requirement. 28 U.S.C. 288." 328 U.S. at 268.

Petitioner believes that this requirement has not been met in this case because the court articulates no basis whatsoever for its apparent "assumption," directly contrary to the

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[17]"(T)he Corps did offer plaintiff the necessary permits to develop over 20 acres . . ." and "the market value of the property, post-denial, is still between $80,000 and $150,000; the latter figure being the amount plaintiff paid for the property in 1971." *Jentgen v. United States, 657 F2d 1210 (Ct. Cl. 1981).*

[18]See "Ultimate Findings" at App.

finding of the trier of fact, that Mr. Jentgen could make viable economic use of the 20 acres allowed him by the Corps. Such a summary conclusion having no articulated basis does not comport with fundamental fairness and notions of fair play. *Solesbee v. Balkcom,* 339 U.S. 9 (1960).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1981

Appendix

In the United States Court of Claims

No. 415–77

(Decided August 19, 1981)

JAMES J. JENTGEN, TRUSTEE
v. THE UNITED STATES

Thomas C. Henry, for plaintiff; *Carl L. Shipley*, attorney of record. *Shipley, Smoak & Akerman*, of counsel.

Fred R. Disheroon, with whom was *Assistant Attorney General Carol E. Dinkins*, for defendant.

Before FRIEDMAN, *Chief Judge*, SKELTON, *Senior Judge*, and KUNZIG, *Judge*.

OPINION

KUNZIG, *Judge*, delivered the opinion of the court:

In this case, plaintiff contends that he has suffered an uncompensated taking as the consequence of federal regulation affecting his development of a planned residential community near the Everglades.[1] The statutes in question—§ 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, and § 404 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1344—and

[1] The court rejects the trial judge's recommended conclusion of law. While the trial judge also made findings of fact, all the findings necessary to the rendering of this decision are contained herein.

implementing regulations thereunder, prohibit, *inter alia*, obstructions, dredging and filling in navigable waters without the authorization of the Army Corps of Engineers. The latter, stressing environmental factors, has thus far refused to grant plaintiff the permits for which he has applied. We hold that while plaintiff may indeed have sustained some economic loss, the loss is not such as to constitute a taking under the circumstances herein.

I

Plaintiff, Jentgen, in 1971 purchased for $150,000 a 101.8 acre tract located within the city limits of Everglades City, Florida, in an area neighboring the Everglades National Park.[2] Jentgen planned to develop there a water-oriented residential community. The property, completely undeveloped, lay astride the mean high water mark and contained large areas of dense mangrove vegetation, including wetlands. The project would necessitate considerable earth-moving, dredging and filling, and the erection of a dock and marina.

As of 1971, the purchase date, these proposed activities were subject to § 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403 (1976) (Rivers and Harbors Act), which requires a permit from the Army Corps of Engineers to the extent that "any obstruction" is created in the "navigable waters of the United States." The Corps defines "navigable waters of the United States" to encompass tidal waters shoreward to the mean high water mark and/or waters suitable for use in commercial navigation. *See* 33 C.F.R. § 322.2(a) (1980).

In 1972, Congress enacted § 404 of the Federal Water Pollution Control Act Amendments, 33 U.S.C. § 1344 (1976) (FWPCA), which prohibits the "discharge of dredged or fill material . . . into navigable waters" without a permit from the Army Corps of Engineers. The most significant feature of the new statute for the case at bar was the extension of Corps jurisdiction from "navigable waters of the United States" to "navigable waters." It is now well settled that Congress, in

[2] For a more extensive discussion of the ideas reflected herein, *see Deltona* v. *United States*, Ct.Cl. No. 370-76 (slip opinion of Aug. 19, 1981), issued the same date as this opinion.

adopting the latter term, "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause." *National Resources Defense Council, Inc.* v. *Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975). Notably, both the Corps and the courts have interpreted "navigable waters" to include "adjacent wetlands." *See* 33 C.F.R. § 323.2 (1980); *United States* v. *Holland*, 373 F.Supp. 665, 673–674 (M.D. Fla. 1974).

The implication for Jentgen was that, as of 1972, a greater proportion of his property fell within the regulatory jurisdiction of the Corps than had previously been the case and the areas subject to the need for a permit had been widened.

Until 1968, the Corps' sole criterion in granting permits within its jurisdiction was the likely adverse impact upon commercial navigation. However, on December 18, 1968, in response to a growing national concern for environmental values and related federal legislation, the Corps stiffened its requirements, adding the following relevant considerations: fish and wildlife; conservation; pollution; aesthetics; ecology; and the general public interest.

On April 4, 1974, the Corps published further revised regulations so as to:

> 1) incorporate new permit programs under section 404 of the FWPCA;
>
> 2) incorporate the requirements of new federal legislation by adding to the factors to be weighed in the so-called "public interest review," including: economics; historic values; flood damage prevention; land-use classification; recreation; water supply and water quality;
>
> 3) inaugurate a full-fledged wetlands policy to protect wetlands subject to the Corps' jurisdiction from unnecessary destruction.

See 42 Fed. Reg. 37122–37164 (1977); 33 C.F.R. §§ 320.1–329.16 (1980). These stiffening requirements are the main source of the difficulties which have brought Jentgen before this court.

In 1973, plaintiff applied for a permit under § 10 of the Rivers and Harbors Act and in 1975 applied for the requisite permit under § 404 of the FWPCA. The applications related to approximately 80 acres of the Jentgen tract; the remaining 20 acres are uplands and can be developed without dredging and filling and, consequently, without the need for Corps authorization. Of the 80 acres covered by the applications, 60

were proposed for development and 20 were to be preserved in the natural state. On July 5, 1977, Jentgen was informed that his applications had been denied as "not in the public interest." The Corps especially stressed the "direct adverse physical impact" upon the mangrove wetlands located on Jentgen's property. Of crucial importance, however, Jentgen was offered modified permits which would have allowed for development of over 20 of the 80 acres covered by the applications, but the permits were declined. At no time has Jentgen sought judicial review of the permit denials. Instead, Jentgen filed suit in this court on August 9, 1977, seeking "just compensation" under the Fifth Amendment for the alleged taking of his property as the consequence of the Government's refusal to allow him to go forward with his original plans. He seeks approximately $6,000,000. Under the specific facts of this case, and the tests enunciated by the courts, we hold that there has been no taking in this case.

II

It is well established as a matter of law that government regulation can effect a Fifth Amendment taking. *See, e.g., Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 123 (1978) (no taking found on the specific facts of that case); *Benenson* v. *United States*, 212 Ct.Cl. 375, 388, 390, 548 F.2d 939, 947, 948 (1977) (taking found). The rationale, as stated by Justice Brennan, is that "[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property." *San Diego Gas & Electric Co.* v. *San Diego*, ___ U.S. ___, ___, 49 U.S.L.W. 4317, 4325 (1981) (Brennan, J., dissenting).[3] While, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922), the principle generally applied is that "if

[3] Justices Stewart, Marshall, and Powell joined Justice Brennan's dissent; Justice Rehnquist, writing separately, expressed general agreement with Justice Brennan's discussion of taking law. The opinion of the Court did not reach the issue addressed by Justice Brennan.

regulation goes too far it will be recognized as a taking," *id.* at 415; *see San Diego Gas, supra*, 49 U.S.L.W. at 4324.

"The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980). It is frequently stated that the question whether a particular restriction effects a taking depends largely upon the particular circumstances of the case. *See, e.g., Penn Central Transp. Co., supra*, at 124. Generally speaking, the Just Compensation Clause preserves governmental power to regulate subject to the dictates of "justice and fairness." *Andrus* v. *Allard*, 444 U.S. 61, 65 (1979).

While "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations," *Penn Central Transp. Co., supra*, the decisions of the Supreme Court "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'" *Id.* at 131, *citing, Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); *Hadachek* v. *Sebastian*, 239 U.S. 394 (1915) (87.5% diminution in value). Similarly, the Court has branded as fallacious the "contention that a 'taking' must be found to have occurred whenever the land-use restriction may be characterized as imposing a 'servitude' on the claimant's parcel." *Penn Central Transp. Co., supra*, at 130 n.27. Instead, "the 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." *Id.* at 131. In one of its most recent pronouncements, the Court crystallized its thinking as follows: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies a[n] owner economically viable use of his land . . . ." *Agins, supra*, at 260; *accord, Hodel* v. *Virginia Surface Mining and Reclamation Ass'n*, ___ U.S. ___, ___, 49 U.S.L.W. 4654, 4662 (1981); *Penn Central Transp. Co., supra*, at 138; *Benenson* v. *United States*, 212 Ct.Cl. 375, 388-389, 548 F.2d 939, 947-948 (1977).

In applying the foregoing considerations, it is important to bear in mind the Supreme Court's admonition:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel *as a whole* . . . .

Penn Central Transp. Co., supra, at 130–131 (emphasis supplied).

III

Plaintiff initially contends that, as the consequence of *post hoc* government regulation during the early 1970's, he has been deprived of the economically viable use of his property and has therefore suffered a taking. The facts, however, thoroughly refute this contention. They show that the Corps did offer plaintiff the necessary permits to develop over 20 acres of the 80 acres covered by his applications, but that plaintiff refused. Overall, the tract contains approximately 20 additional acres of developable uplands which can be developed without first obtaining Corps permits. The record shows that the market value of the property, post-denial, is still between $80,000 and $150,000: the latter figure being the amount plaintiff paid for the property in 1971. These factors are flatly inconsistent with the proposition that plaintiff's property has been rendered valueless as the consequence of government regulation. In our view, the facts of this case are exceedingly weak, far weaker than those presented to the court in the comparable *Deltona* case, also decided this date, where another plaintiff failed in its taking claim. *See supra* at 2 n.2.

Plaintiff alternatively contends that he has suffered a taking solely by virtue of the fact that he has been deprived of the highest and best economic use for his property—if not the entire use. This argument is merely another way of saying that there has been some dimunition in the value of the property, rather than the complete destruction of all economically viable uses. The Supreme Court, however, has clearly held that mere dimunition in value, standing alone, cannot establish a taking. *See Penn Central Transp. Co.*,

supra, at 131. Despite the changed phraseology, plaintiff's alternative argument fails as a matter of law.

By and large, we do not believe that "justice and fairness" require us to find a taking in this case. Reduced to its essentials, this case merely presents an instance of some dimunition in value, or frustration of reasonable investment-backed expectations, stemming from changes in applicable statutes and regulations—an insufficient basis, under *Penn Central*, to establish a taking. We note that in a number of recent cases the Supreme Court has refused to find takings under circumstances arguably far more compelling than those presented by the case at bar. *See, e.g., Agins, supra; Penn Central Transp. Co., supra.*[4]

We feel that these considerations are dispositive of plaintiff's claim and hold that there has been no taking.[5]

CONCLUSION OF LAW

The court concludes as a matter of law that plaintiff is not entitled to recover, and the petition is dismissed.

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[4] Because of our ultimate disposition of this cause, it is unnecessary to consider the impact of the federal navigational servitude upon the issues herein. *See generally Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979).

[5] All other arguments raised by plaintiff, although not directly addressed by this opinion, have been considered and found to be without merit.

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ULTIMATE FINDINGS

1. Jentgen, as trustee, is the owner of the subject real property.

2. The subject real property is, except for that portion designated on Plaintiff's Exhibit 7 as "Natural Vegetation Area," above mean high water, as measured by the 1929 NGVD.

3. All of the necessary Florida state permits required to develop the property, as set forth in Plaintiff's Exhibit 7, were obtained from the State of Florida prior to filing application for a Federal permit under the applicable Federal statutes.

4. But for the denial by the Corps of Engineers of Federal permits under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 applied for by Jentgen, the Jentgen development could have been completed as originally proposed. (See Appendix C.)

5. The Corps offered to issue plaintiff a "modified permit" on the basis of a Corps "plan," set forth in Plaintiff's Exhibit 33 (Appendix "F"), but such plan would not provide the highest and best use of the property.

6. Any development plan adaptable to those areas designated as "developable lands" in Appendix "F" (Plaintiff's Exhibit 33) is neither economically feasible nor practically marketable.

7. Unless developed for residential purposes, plaintiff's property has no other economic value whatsoever; its ecological value, if any, being worthless to private owners and of little or no value to commercial or sports fishermen in the area. It has not even been shown to have any value as a conservation area except as an adjunct to the nearby Everglades National Park.

Opposition

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No. 81-1168

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES J. JENTGEN, TRUSTEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Claims properly dismissed petitioner's inverse condemnation claim after finding that denial of permits under the Clean Water Act and the Rivers and Harbors Act had not deprived petitioner of all economically viable uses of his property.[1]

2. Whether the Court of Claims must cite specific evidence in the record of the case in support of its findings of fact.

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[1] A related issue in presented in *The Deltona Corporation* v. *United States*, 657 F. 2d 1184 (1981), cert. pending, No. 81-1207.

Petition for

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A-1 to A-7) is reported at 657 F. 2d 1210.

JURISDICTION

The judgment of the Court of Claims was entered on August 19, 1981. By order dated November 6, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari until December 17, 1981, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATUTES INVOLVED

The pertinent provisions of Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403, and Sections 301, 404, and 502 of the Clean Water Act, 33 U.S.C. (& Supp. III) 1311, 1344, and 1362, are set forth as an appendix to this brief (App., *infra*, 1a-3a).

STATEMENT

Petitioner brought this action seeking compensation under the Takings Clause of the Fifth Amendment after the United States Army Corps of Engineers (Corps) denied him permits to dredge a marina and connect it to a navigable river, and to spread fill material over wetlands (mangrove swamps), in order to construct a small housing development. The Corps denied permission under Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403, and Section 404 of the Clean Water Act, 33 U.S.C. (& Supp. III) 1344, after it concluded that petitioner's proposed development would have significant adverse environmental effects.

1. In 1971 petitioner paid $150,000 for a 101.8-acre tract in Everglades City, Florida, intending to develop a community of vacation or recreation homes (Pet. App. A-2). The tract is bounded on the south by Chokoloskee Bay, and on the north by Panther Creek. It fronts on the east for some 7,000 feet along the Barron River (Tr. Div. Op. 81).[2] The property lay astride the mean high water mark, and included 23.8 acres of uplands resulting from earlier deposits of dredged spoil. The rest of the tract consists of wetlands subject to sporadic tidal inundation and covered with mangrove vegetation (*id.* at 4, 82-83; Pet. App. A-2). Petitioner proposed to dredge a marina and three lakes within the property, and to connect the marina with the Barron River by removing a plug of land separating the two. The dredged material would be redistributed over the wetlands to raise them to a level suitable for construction (Tr. Div. Op. 6-7). Petitioner also proposed to build a pier extending into Chokoloskee Bay (*id.* at 9).

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[2]"Tr. Div. Op." refers to the opinion of the trial division judge, submitted to the Court of Claims.

In 1973 petitioner applied for a permit under Section 10 of the Rivers and Harbors Act to construct the dock and marina, and in 1975 applied for a permit under Section 404 of the Clean Water Act to fill the mangrove wetlands.[3] The applications covered nearly 80 acres of petitioner's land; the remaining 23.8 acres of uplands could be developed without dredging and filling, and, consequently, without the need for permits. Of the 80 acres covered by the applications, 20 were to be preserved in their natural state, and 60 were proposed for development (Pet. App. A-3 to A-4). In 1976 the Corps of Engineers offered petitioner a permit which would have allowed him to fill 20 acres of wetlands on his tract (*id.* at A-4). This permit, together with the 23.8 acres of uplands for which none was required, would have allowed petitioner to develop about 43 acres of the 100-acre tract. Petitioner also could have constructed a marina within this 43-acre area (Tr. 1884-1886).[4] Petitioner rejected the offer.

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[3]In 1972 Congress passed extensive amendments to the Federal Water Pollution Control Act, Pub. L. No. 92-500, 33 U.S.C. 1251 *et seq.*, and established for the first time a comprehensive federal program for the control and abatement of pollution of the nation's waters. That Act, amended in 1977, and renamed the Clean Water Act, is the principal federal law involved in this case. "Pollutant" is defined in Section 502, 33 U.S.C. 1362, to include "dredged spoil, solid waste, * * * biological materials, * * * rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water." Section 301(a) of the Act, 33 U.S.C. 1311(a), prohibits the discharge of any pollutant unless a permit has been obtained. Section 404 defines the conditions under which permits may be issued "for the discharge of dredged or fill material into the navigable waters." 33 U.S.C. (Supp. III) 1344. The phrase "navigable waters" is defined for purposes of the Act as "the waters of the United States," 33 U.S.C. 1362(7), and under the applicable regulations includes wetlands. 33 C.F.R. 323.2. See also S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972) ("navigable waters" in the Act is to be given "the broadest possible constitutional interpretation"); *United States* v. *Ashland Oil & Transportation Co.*, 504 F. 2d 1317, 1323-1327 (6th Cir. 1974).

[4]"Tr." refers to the transcript of the proceedings before the trial judge.

In July 1977, the Corps denied petitioner's applications for both the Section 404 and the Section 10 permits. The denial was based on : (1) the wetlands policy of the Corps, 33 C.F.R. 320.4, which prohibits destruction of wetlands through dredging or filling unless the applicant can prove that such destruction is in the public interest,[5] and (2) guidelines established by the Environmental Protection Agency, 40 C.F.R. Part 230, pursuant to Section 404(b) of the Clean Water Act, for evaluation of the water quality effects of discharges from dredge and fill activity.

2. On August 9, 1977, petitioner filed this action in the Court of Claims alleging that the denial of permits amounted to a condemnation of his property, for which he was entitled to compensation under the Fifth Amendment.[6] The trial judge concluded that a taking had occurred. He reasoned that any legislation or regulation restricting the use of property not subject to the navigational servitude was a taking for which just compensation must be provided (Tr. Div. Op. 47). The judge found an exception to that general rule where the government exercised police powers "for the purpose of *abating a nuisance* or to *prevent harm*" (*id.* at n.25 (emphasis in original)), but held that Congress in the Clean Water Act was acting "for the public benefit" and not to prevent harm (*id.* at 47).

The Court of Claims rejected the trial judge's recommendation, and held that no taking had occurred. In the court's view, the relevant question was whether the permit denials did "not substantially advance legitimate state interests . . .

---

[5]The wetlands policy of the Corps was originally adopted in 1974 in connection with its permit program under Section 10 of the 1899 Act. It has since been made applicable by regulation to Section 404 permit applications as well.

[6]Petitioner has not sought to challenge the legality of the permit denials in United States district court.

or den[y petitioner] economically viable use of his land" (Pet. App. A-5, quoting *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980)). The court concluded that the facts "thoroughly refute[d]" petitioner's contention that he had been deprived of economically viable use (Pet. App. A-6), noting that the petitioner's tract contained more than 20 acres which did not require federal permits for development, and that the Corps had offered petitioner permission to develop 20 additional acres of the 80 covered by his application (*ibid.*). The court found that "the market value of the property, post-denial, is still between $80,000 and $150,000: the latter figure being the amount plaintiff paid for the property in 1971" (*ibid.*). In short, petitioner's claim was "exceedingly weak" (*ibid.*), amounting at best to a mere diminution in value insufficient, by itself, to establish a taking.

ARGUMENT

The decision below is correct, does not conflict with any decision of this Court or any court of appeals, presents only questions of fact peculiar to this case, and is not of sufficient importance to merit further review by this Court.

1. In ruling that no taking had occurred, the Court of Claims followed the law set forth by this Court in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), and *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980). The court noted particularly this Court's direction that the determination should turn on the particular circumstances of the case, including the character of the governmental action, "[t]he economic impact of the regulation on the claimant and * * * the extent to which the regulation has interfered with distinct investment-backed expectations" (Pet. App. A-5, quoting *Penn Central*, *supra*, 438 U.S. at 124). See also *Agins*, *supra*, 447 U.S. at 260. This Court has repeatedly held that a valid exercise of federal regulatory power does not take private property merely because it may impair or restrict some uses of property.

Andrus v. *Allard*, 444 U.S. 51 (1979). Petitioner acknowledges (Pet. 6) that this rule is appropriate in cases involving a state's exercise of its police power, but asserts that a different rule is required when Congress acts under the Commerce Clause. In support of this novel proposition petitioner cites *United States* v. *Causby*, 328 U.S. 256 (1946). Petitioner's effort to rewrite the law of eminent domain ignores this Court's recent pronouncements on the subject, and has no support in *Causby*.

In *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.*, No. 79-1538 (June 15, 1981), this Court rejected the notion that a federal environmental protection statute "is unconstitutional because it presumes the existence of a federal police power," and reaffirmed the well-established principle that " '[t]he authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce.' *United States* v. *Darby*, 312 U.S. 100, 116 (1941), quoting *United States* v. *Rock Royal Co-operative*, 307 U.S. 533, 569-570 (1939)." Slip op. 25, n.32. See also *Cleveland* v. *United States*, 329 U.S. 14, 19 (1946). The Court went on to sustain the Surface Mining Control and Reclamation Act, 30 U.S.C. (Supp. III) 1201 *et seq.*, an environmental statute based on the Commerce Clause, against a charge that it effected a taking for which compensation was required under the Fifth Amendment. The determination, the Court said, was one which varied with the particular circumstances of the case, including " 'the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action * * *.' " Slip op. 28, quoting *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979). In the context of a facial challenge to the law, the Court continued, the crucial question was whether the statute " 'denies an owner economically viable use of his land.

. . .' " Slip op. 29, quoting *Agins* v. *City of Tiburon, supra,* 447 U.S. at 260. Those questions are precisely the ones asked by the Court of Claims in this case, and by this Court in addressing claims of inverse condemnation whether by federal or state government. See *Kaiser Aetna* v. *United States,* 444 U.S. 164, 174-175 (1979) (federal); *Andrus* v. *Allard,* 444 U.S. 51, 65-68 (1979) (federal); *Penn Central, supra,* 438 U.S. at 124 (municipal); *Agins, supra,* 447 U.S. at 260-261 (municipal).

This Court did note in *Penn Central* that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, see, *e.g., United States* v. *Causby,* 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124. That distinction was the basis for the decision in *Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979), where the government had allowed public access to petitioners' private pond. In that context, the Court found, "the imposition of the navigational servitude * * * will result in an actual physical invasion of the privately owned marina. * * * And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation. See *United States* v. *Causby,* 328 U.S. 256, 265 (1946) * * *." 444 U.S. at 180. But *Causby* has little relevance to this case, where what is challenged is a "public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central, supra,* 438 U.S. at 124.[7]

---

[7]Exactly the same may be said of the other cases cited by petitioner at Pet. 6, n.11; *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962) (airplane overflights); *Portsmouth Co.* v. *United States,* 260 U.S. 327 (1922) (cannon fire over claimant's land); *United States* v. *Cress,* 243 U.S. 316 (1917) (repeated flooding of claimant's land).

If one applies the test properly relied on by the Court of Claims it is clear that petitioner has no Fifth Amendment claim. With respect to the economic impact of the permit denials on petitioner's property, the court found that the "market value * * * post-denial, is still between $80,000 and $150,000; the latter figure being the amount plaintiff paid for the property in 1971" (Pet. App. A-6). Moreover, the Corps offered petitioner permits to develop 20 of the 80 acres covered by his applications, and the tract contained more than 20 additional acres that could be developed without permits (*ibid.*). The purely hypothetical possibility that petitioner might have been able to develop the land at a profit is hardly controlling. "[P]erhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Andrus* v. *Allard*, 444 U.S. 51, 66 (1979).

If one looks to the character of the challenged governmental action, the conclusion that petitioner has suffered no taking becomes even more compelling. The Court of Claims found that petitioner's development "lay astride the mean high water mark and contained large areas of dense mangrove vegetation, including wetlands. The project would necessitate considerable earth-moving, dredging and filling, and the erection of a dock and marina" (Pet. App. A-2). The authority of the United States to protect its navigable waters from dredging, filling, and other forms of pollution is beyond dispute. *EPA* v. *National Crushed Stone Assn.*, 449 U.S. 64 (1980); *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973). "More importantly for the present case, * * * [where] 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests." *Penn Central, supra*, 438 U.S. at 125. See also *Goldblatt* v.

Hempstead, 369 U.S. 590 (1962); *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915).

Given the considerable economic value petitioner's property retains, the purely hypothetical possibility that the proposed development would have been remunerative, and the character of the challenged governmental action, it is apparent that the ad hoc, factual question about the impact of the permit denials is not one which warrants review by this Court.

2. Petitioner also claims that he was denied due process because the Court of Claims rejected the trial judge's recommended findings of fact and concluded, without citing to passages in the record, that the property still had a viable economic use. The applicable statute and rules permit the Court of Claims to reject recommended findings of fact, 28 U.S.C. 2503(b); Ct. Cl. R. 13(d), 147(b), and there is no authority for petitioner's proposition that the court's own findings must be accompanied by citations to the record. What is required, according to the passage in *United States* v. *Causby*, *supra*, 328 U.S. at 267-268, cited by petitioner, is that the court make "[f]indings of fact on every 'material issue.' " This the court did. Regarding the value of the property it stated (Pet. App. A-6):

> The facts * * * show that the Corps did offer plaintiff the necessary permits to develop over 20 acres of the 80 acres covered by his applications, but that plaintiff refused. Overall, the tract contains approximately 20 additional acres of developable uplands which can be developed without first obtaining Corps permits. The record shows that the market value of the property, post-denial, is still between $80,000 and $150,000; the latter figure being the amount plaintiff paid for the property in 1971. These factors are flatly inconsistent

with the proposition that plaintiff's property has been rendered valueless as the consequence of government regulation.

Indeed, petitioner testified that the residual value of the property, without accounting for the possibility of developing the 20 acres for which the Corps was willing to grant permits, was between $80,000 and $90,000 (Tr. 117. See also *id.* at 1535-1536 (testimony of government's appraiser that the property was worth $150,000)).

Petitioner's real contention is that he disagrees with the court's finding concerning the present value of the property. That factual issue was correctly determined, and in any event does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1982

DOJ-1982-02

Appendix

APPENDIX

STATUTES INVOLVED

1. Section 10 of the Rivers and Harbors Act, as codified at 33 U.S.C. 403, provides:

> **§ 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in**
>
> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

2. Section 301(a) of the Clean Water Act, as codified at 33 U.S.C. 1311(a), provides:

> **§ 1311. Effluent limitations**

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

3. Section 404(a) of the Clean Water Act, as codified at 33 U.S.C. (Supp. III) 1344(a), provides:

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

4. Section 502 of the Clean Water Act, as codified at 33 U.S.C. 1362, provides in pertinent part:

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

* * * * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat,

wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. * * *

* * * * *

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.